In Re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation Doc. 2306

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE METHYL TERTIARY BUTYL ETHER PRODUCTS LIABILITY LITIGATION

This document pertains to:

City of New York v. Hess Corp., et al.,
Case No. 04-CIV-3417

Master File No. 1:00-1898
MDL 1358 (SAS), M21-88

DEFENDANTS' MOTION TO BAR PUNITIVE DAMAGES BASED ON THE MARKET SHARE AND COMMINGLED PRODUCT THEORIES

The defendants listed in Appendix A hereby move *in limine* to preclude the City of New York from arguing that punitive damages are available and from presenting evidence relevant solely to punitive damages. In the alternative, defendants move for summary judgment on the City's claims for punitive damages.[1]

Under New York law, if the Plaintiff City of New York seeks to hold defendants liable on either the market share theory of liability or the "commingled product theory of market share liability," the City may not seek an award of punitive damages. Based on prior rulings of this Court and the New York Court of Appeals, as well as constitutional constraints, the City may not seek or recover punitive damages if liability is based on either the market share or commingled product theories.

[1] In the *Suffolk* case, the Court held that the appropriate motion for defendants to file to bar plaintiffs' demand for punitive damages was a motion *in limine* based on the Court's "inherent authority to manage the course of trials." *In re MTBE Prods. Liab. Litig.*, 517 F. Supp. 2d 662, 666-67 (S.D.N.Y. 2007). Defendants therefore file this submission as a motion *in limine*. The Court also recognized, however, that "the Second Circuit has repeatedly endorsed the use of summary judgment as to punitive damages 'claims.'" *Id.* at 666 n.17 (citations omitted). Thus, in the alternative, defendants file this motion as one for partial summary judgment under Fed. R. Civ. P. 56 and 54(b).

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Defendants respectfully request that the Court grant this motion and enter an order either barring all evidence and arguments on punitive damages, or granting defendants summary judgment on the City's claim for punitive damages, to the extent the City relies on a market share theory or a commingled product theory of liability. That order is necessary to protect defendants from unwarranted, unfair and impermissible punishment for making gasoline that did not cause the City's damages. Conversely, the order would not impair the City's rights, as it does not have a right to punitive damages, nor impede its ability to recover whatever actual damages or other relief may be necessary to remedy its alleged damages.

Defendants submit herewith a memorandum in support of this motion; a statement of facts pursuant to Local Rule 56.1; and a declaration with exhibits.

Dated: March 20, 2009

Respectfully submitted,

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On behalf of Defendants listed on Appendix A

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of 1) Defendants' Motion to Bar Punitive Damages Based on the Market Share and Commingled Product Theories ("the Motion"); 2) Memorandum in Support of the Motion; 3) Declaration of Richard Wallace in Support of the Motion; and 4) Defendants' Rule 56.1 Statement in Support of the Motion were served via email upon liaison counsel and via LexisNexis File & Serve to all other counsel of record on the 20th day of March, 2009. A copy was provided to the Clerk, Seth Ard, via email, and the original and one copy were served via Federal Express to the Clerk of the Court.

Richard E. Wallace, Jr.